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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, Petitioner,

v.

SEATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP COMPANY; and UNITED STATES OF AMERICA, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS PACIFIC FAR EAST LINE, INC., and THE OCEANIC STEAMSHIP COMPANY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17)[1] is reported *sub nom. Seatrain Lines, Inc. v. Federal Mari-*

[1] "Pet. App." refers to pages in the appendix to the Commission's petition for a writ of certiorari. "App." references are to pages of the single appendix filed by petitioner pursuant to Rules 26 and 36.

time Commission at 460 F.2d 932. The opinions of the Federal Maritime Commission (Pet. App. 51 and Pet. App. 55) are not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 23, 1972 (App. 70). The petition for a writ of certiorari was filed on June 20, 1972 and granted on December 11, 1972 (34 L.Ed. 2d 510). The jurisdiction of this Court rests on 28 U.S.C. §§1254(1) and 2350.

QUESTION PRESENTED

Under Section 15 of the Shipping Act, 1916, Federal Maritime Commission approval of certain anticompetitive agreements among common carriers by water subject to the Act excepts those agreements from the provisions of the antitrust laws. The question presented is whether the court of appeals correctly held that Section 15 does not empower the Commission to approve and thereby immunize from the antitrust laws a contract by one such carrier to acquire the assets of another.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. §814 (1970), is set out in pertinent part at pp. 2 and 3 of petitioner's brief.

STATEMENT

1. *Background of the Agreement in Suit.*

This case has its genesis in an October 1970 contract of sale between Pacific Far East Line, Inc. ("PFEL") and The Oceanic Steamship Company ("Oceanic"), a wholly owned subsidiary of Matson Navigation Company ("Matson"). Under that contract (set out in pertinent part at App. 2) PFEL acquired Oceanic's four ships and its interest in two "full containerships"[2] under construction, together with personnel and shoreside equipment related to the vessels' operations. The contract neither terminated Oceanic's corporate existence nor required that carrier or its parent to refrain or withdraw from competition with PFEL in any way (Pet. App. 53).

PFEL and Oceanic were not competitors, although both were common carriers by water in the foreign commerce of the United States operating on routes in the Pacific. Both carriers were subsidized under the Merchant Marine Act, 1936,[3] and confined by law and their government subsidy contracts to operations on different trade routes established by the Secretary of Commerce: PFEL on Trade Route 29 (U. S. West Coast to the Far East) and Oceanic on Trade Route 27 (U. S. West Coast to Australia and New Zealand).[4] PFEL also maintained

[2] As distinguished from conventional freighters or "break-bulk" ships, full containerships are modern vessels designed to carry cargo stored in metal boxes of standard sizes in cells specially designed for the purpose. See, *Sea-Land Service, Inc. v. Connor*, 418 F.2d 1142 (D.C. Cir. 1969).

[3] 46 U.S.C. §1101 *et seq.*

[4] The Merchant Marine Act, 1936 (in 46 U.S.C. §§1120 and 1121) authorizes the Secretary of Commerce to designate routes "essential for the promotion, development, expansion, and mainte-

an unsubsidized operation from the West Coast to Guam with two vessels confined to that service by statute.[5] As subsidized operators neither carrier could serve any other trade route without government permission.

2. *Proceedings Before the Federal Maritime Commission.*

Under Section 15 of the Shipping Act, 1916, 46 U.S.C. §814, certain agreements between common carriers by water subject to the Act are unlawful unless first filed with and approved by the Federal Maritime Commission.[6] Commission approval of such agreements insulates them from the operation of the antitrust laws.[7] Contracts

nance of the foreign commerce of the United States . . . ." The government has entered into various operating-differential subsidy agreements "to meet foreign-flag competition and to promote the foreign commerce of the United States" on these trade routes as authorized by 46 U.S.C. §§1171(a) and 1173(a). Vessels operating under such agreements are restricted to the limits of the routes and services so determined to be essential. 46 U.S.C. §1173(a). See, generally, *Pacific Far East Line, Inc. v. United States*, 394 F.2d 990, 992-93 (Ct. Cl. 1968); *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 570-71, 582 (Ct. Cl. 1969).

[5]Act of December 14, 1967, P. L. No. 90-195, 81 Stat. 581, 1 U.S. Code Cong. & Ad. News 633 (1967). See S. Rep. No. 792, 90th Cong., 1st Sess. (1967), 2 U.S. Code Cong. & Ad. News 2172-73 (1967).

[6]This authority was initially conferred on the United States Shipping Board (39 Stat. 728, 733 (1916)), transferred to several other agencies over the years (see Executive Order No. 6166, §12 (1933); 49 Stat. 1985 (1936); and 64 Stat. 1273 (1950)); and now rests in the Commission, 75 Stat. 840 (1961). References to the Commission in this brief include those predecessor agencies where the context requires.

[7]Section 15 provides in pertinent part that: "Every agreement, modification or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto." 46 U.S.C. §814.

for the sale of ships and related assets by one ocean carrier to another are not among those expressly included in Section 15 as requiring such approval and entitled to that exemption.

As a matter of business expediency PFEL and Oceanic submitted the contract of sale to the Commission, but in doing so expressly informed the agency that "they had been advised by their counsel that the Contract of Sale does not require approval of the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916." (App. 33). The Commission disagreed,[8] designated the contract as "Agreement No. 9903," and published notice in the Federal Register that it had been filed "for approval pursuant to Section 15 of the Shipping Act, 1916." 35 F.R. 16114 (October 14, 1970).

Seatrain Lines, Inc. ("Seatrain"), which asserted that it was "considering entry" into the West Coast–Far East and South Pacific trades, objected to the agreement and requested a hearing (App. 35). PFEL and Oceanic opposed the request on the ground that Seatrain lacked the requisite interest, preserving as well their basic position that in any event the contract of sale "is not subject to Section 15." (App. 52, n. 1). The Commission found, *inter alia*, that Seatrain's protest was based on "mere speculation," rejected the demand for hearing and approved the agreement on October 27, 1970; on December

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[8]The Commission divided on the issue. Commissioner Day remains of the view that "the Commission is without jurisdiction over [ship sale and merger] agreements." See *Agreement 9827 Between United States Lines, Inc., and Sea-Land Service, Inc. et al.*, slip opinion p. 2, (F.M.C. Docket Nos. 69-56 and 70-51, February 12, 1973.)

8, 1970 the Commission denied Seatrain's motion for reconsideration (Pet. App. 51, 57).[9]

3. *Proceedings in the Court of Appeals.*

On February 8, 1971 Seatrain petitioned the court below for direct review of the Commission's order under the Hobbs Act,[10] which makes the United States a respondent in such proceedings.[11] PFEL and Oceanic intervened as respondents and the Department of Justice appeared for the United States in that action. These three respondents contended, *inter alia*, that Section 15 of the Shipping Act did not clothe the Commission with authority to approve and immunize from the antitrust laws contracts for the sale of assets between ocean carriers.

The District of Columbia Circuit agreed, following Judge Garth's similar holding in *United States v. R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971), and distinguishing the contrary result reached by a divided court in *Matson Navigation Co. v. F.M.C.*, 405 F.2d 796 (9th Cir. 1968). In a decision rendered March 23, 1972, the court of appeals held that "both the language and context of Section 15 itself and the legislative history accompanying it demonstrate" that such agreements are not covered by the section, 460 F.2d

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[9]The contract of sale was also contingent on certain approvals by the Maritime Administration of the Department of Commerce, which were obtained. See, 12 Pike & Fischer Ship. Reg. Rep. 218 (Jan. 15, 1971).

[10]Now 28 U.S.C. §§2341 *ff.*

[11]28 U.S.C. §2344.

932, 934 (Pet. App. 20-21). The court below vacated the Commission's approval of Agreement No. 9903 and directed the Commission to remove the agreement from its docket (Pet. App. 50). The Commission then petitioned this Court to review the D.C. Circuit's decision, raising only the question of its jurisdiction under Section 15 (Pet. 2); no cross-petitions were filed.

SUMMARY OF ARGUMENT

I.

Section 15 of the Shipping Act, 1916, exempts certain kinds of agreements among carriers subject to the statute from judicial scrutiny under the antitrust laws if they receive the prior approval of the Federal Maritime Commission. 46 U.S.C. §814. Contracts for the sale of one ocean carrier's assets to another are not among those specified in Section 15 as requiring approval and entitled to such immunization. The court below correctly held that the section contemplates only limited antitrust exemption for ongoing cooperative working agreements among competing ocean carriers which are amenable to the supervision of the Commission and does not reach permanent, one-time transactions, like the sale of one carrier's fleet to another, which are difficult if not impossible to unscramble at a later date.

II.

The Commission's principal attack upon the decision below purports to be based on its reading of the "plain meaning" of Section 15. When analyzed, however, its real argument is that a ship sale contract or merger arrangement is one potentially "destroying competition" and therefore within Section 15 by implication. The lower

court's rejection of this so-called "plain meaning" approach is on very sound ground. Congress has taken the identical language from Section 15 upon which the Commission relies and used it in what is now the Federal Aviation Act of 1958 in a manner confirming that it refers only to ongoing working and pooling agreements and not to asset acquisitions or mergers. See 49 U.S.C. §§1378, 1382, and 1384. The Commission's contrary view does not merit judicial deference; it is of recent vintage and by no means a contemporaneous administrative construction. Indeed, Commission practice until recent years has always been to refuse jurisdiction over ship sale contracts unless they were coupled with some form of ongoing anticompetitive working agreement between the parties such as one to refrain from competition. The Commission's position also flies in the face of the accepted principle that repeal of the antitrust laws by implication are not favored. This Court's earlier decision in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968), does not require a contrary result. The question of merger jurisdiction under Section 15 was not before the Court in that case and the decision itself makes plain that not all agreements which might be read into Section 15 are in fact within that provision.

III.

The legislative history confirms the court of appeals' reading of Section 15. The "Alexander Report" upon which it was based was the result of a Congressional investigation which sought not to immunize consolidations and mergers, but rather to bring anticompetitive working arrangements and conference agreements in the shipping industry out into the open and under government regulation as a means, among other things, of discouraging such mergers and consolidations.

IV.

The Commission's reliance on a 1950 amendment to Section 7 of the Clayton Act as confirming its jurisdiction over asset acquisitions was properly rejected as a bootstrap attempt to gain additional authority where none was intended to be conveyed. See *California v. Federal Power Commission*, 369 U.S. 482, 486 (1962). After more than 50 years of operation, because Shipping Act and antitrust policies are not identical there is no reason now why the Commission's jurisdiction must be expanded to cover mergers and acquisitions in order to enable it to do its job properly. At all events, that policy argument should be addressed to the Congress, which we note has declined to grant other regulatory agencies authority to immunize asset acquisitions and mergers from the antitrust laws (See e.g. *California v. Federal Power Commission, supra,* and, even where it has done so, has insisted upon the application of different standards to such transactions than govern anticompetitive working agreements. *E.g.*, 49 U.S.C. §§1378 and 1382.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONSTRUED SECTION 15 OF THE SHIPPING ACT, 1916, AS AUTHORIZING ANTITRUST IMMUNITY ONLY TO ONGOING ARRANGEMENTS AMENABLE TO COMMISSION SUPERVISION.

Under Section 15 of the Shipping Act, 1916, certain agreements must have Commission approval to be lawful; such agreements when approved are excepted from the antitrust laws. The provision directs there be filed for

Commission approval every agreement between parties subject to the Act (46 U.S.C. §814):

[1] "fixing or regulating transportation rates or fares";

[2] "giving or receiving special rates, accommodations, or other special privileges or advantages";

[3] "controlling, regulating, preventing, or destroying competition";

[4] "pooling or apportioning earnings, losses, or traffic";

[5] "allotting ports or restricting or otherwise regulating the number and character of sailings between ports";

[6] "limiting or regulating in any way the volume or character of freight or passenger traffic to be carried"; or

[7] "in any manner providing for an exclusive, preferential, or cooperative working arrangement."

The arrangements Congress made subject to Commission approval—and for which it authorized antitrust exemption—are thus spelled out in detail in Section 15; conspicuous by their omission are references to contracts involving asset acquisitions, such as the sale of ships involved here, and mergers. It is the substance of the Commission's position that these are included by implication. It contends that PFEL's contract to acquire Oceanic's assets was an agreement which could "quite literally" eliminate or prevent competition between those ocean carriers and, therefore, Commission jurisdiction to approve that contract—and to immunize it from the antitrust laws—"must follow from the plain meaning of the language of Section 15 [Item 3]." (Brief, p. 7).

The court of appeals rejected that "plain meaning" argument on the ground that Section 15 is directed at a discrete problem: the control of ongoing anticompetitive working arrangements among water carriers amenable to Commission supervision. The court held that single transactions of a permanent nature such as the sale of all assets—which would be difficult if not impossible to undo or modify at a later date[12] —were not intended to be governed by the Section and not entitled to receive antitrust immunity. The D. C. Circuit was led to this conclusion by the structure of the Act, its legislative history, and its understanding of the "fundamental import" of the nation's antitrust policies. We are in complete accord with the court of appeals' position expressed in its opinion and, in the interest of brevity, adopt rather than restate those arguments. We address ourselves here directly to the Commission's attempts to refute them.

II.

THE "PLAIN MEANING" OF SECTION 15 DOES NOT MAKE ASSET ACQUISITIONS OR MERGERS SUBJECT TO THE COMMISSION'S JURISDICTION.

The Commission's basic position is that the "plain meaning" of Section 15 gives it jurisdiction over ship acquisitions and mergers. It concedes, however, as indeed it must, that "acquisition, merger or consolidation agreements are not specifically enumerated in Section 15." (Brief, p. 14). The Commission's contentions thus boil down to the argument that its authority is implied in the statutory language referring to "agreements control-

[12] See, e.g., *California v. Federal Power Commission*, 369 U.S. 482, 488-489 (1962).

ling, regulating, preventing or destroying competition." (Clause [3], *supra*). The superficial appeal of this argument does not withstand a close analysis.

A. Congress has elsewhere used the language the Commission relies on in a manner contrary to the Commission's understanding.

There are a number of persuasive reasons why that "plain meaning" argument lacks merit, not the least of which is that Congress used the very language the Commission relies on as a model in other legislation which makes it abundantly clear that the phrase in question does not encompass asset acquisitions or mergers. Title IV of the Civil Aeronautics Act of 1938, re-enacted without substantive change as Title IV of the Federal Aviation Act of 1958, 49 U.S.C. §§1371 *et seq.*,[13] provides for air carrier regulation in a manner parallel to that governing ocean carriers under the Shipping Act, 1916. Section 412, now 49 U.S.C. §1382,[14] requires Civil Aeronautics Board approval of

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[13] See *Pan American World Airways v. United States*, 371 U.S. 296, 300-301 (1963), and H. R. Rep. No. 2360, 85th Cong., 2nd Sess. (1958), 2 U.S. Code Cong. & Ad. News 3741, 3755 (1958).

[14] Section 412, 49 U.S.C. §1382, provides (emphasis added):

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carriers and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, *or for control-*

specified anticompetitive arrangements between air carriers and was explicitly modelled on Section 15 of the Shipping Act. *McManus v. C.A.B.*, 286 F.2d 414, 419 (D.C. Cir. 1961), *certiorari denied*, 366 U.S. 928.[15] In language virtually identical to that of Section 15 of the Shipping Act, 1916, which the Commission relies on here, Section 412 requires air carriers to file for Board approval "every contract or agreement [among air carriers] . . . controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition, * * *." As is the case with the Shipping Act, Board approval of such agreements carries with it immunity from the antitrust laws. 49 U.S.C. §1384.

Congress did not, however, intend the quoted language of Section 412 to apply to transactions in the nature of asset acquisitions or mergers. Rather, it provided explicitly for such transactions in an entirely separate provision of the same Act, Section 408, now 49 U.S.C.

(footnote 14 continued)

ling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

[15] See, also, *ATC Agency Resolution Investigation*, 29 C.A.B. 258, 259, 307 (1959), the underlying Board decision.

§1378.[16] See *Pan American Airways v. United States*, 371 U.S. 296, 301-304 (1963). Section 408—which has no Shipping Act counterpart—provides in pertinent part that: "(a) it shall be unlawful unless approved by order of the Board as provided in this section— * * * (2) For any air carrier . . . to purchase, lease or contract to operate the properties, or any substantial part thereof, of any air

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[16] Section 408, 49 U.S.C. §1378, provides in pertinent part:

(a) it shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier; . . . .

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, ... Unless, after . . . hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: . . . .

carrier, * * *." If the language in Section 412 taken from Section 15 of the Shipping Act, relating to filing and approval of agreements "controlling, regulating, preventing or otherwise eliminating . . . competition," was meant to embrace asset acquisitions and mergers, then Sections 408 would be surplusage. [17] This is a result not lightly attributed to Congress. *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971).

We recognize that the actions of a later Congress are not necessarily controlling respecting the intentions of an earlier one. The Civil Aeronautics and Shipping Acts, however, represent legislative attempts to resolve compar-

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[17]The Commission attempts to distinguish the separate provisions in the Civil Aeronautics Act, treating acquisitions differently than pooling agreements and other ongoing arrangements, on the basis of a *dictum* in an early Board decision citing both Sections 408 and 412 in an acquisition case. *Acquisition of Marquette by TWA*, 2 C.A.B. 1, 4 (1940). (Brief, p. 17). Reliance on that case is misplaced: (1) the question was not before the Board in *Marquette*, (2) the Board quoted only Section 408 (*i.e.*, the merger section) language as the basis for its substantive jurisdiction over the acquisition, and (3) the agency's *dictum* (if it be that) conflicts with this Court's own analysis of the Civil Aeronautics Act in *Pan American World Airways v. United States*, 371 U.S. 296, 304 (1963). Moreover, the Commission makes no attempt to explain why Congress would want the same acquisition of assets transaction covered by two separate provisions of the Act each applying different standards for approval. Compare Section 408(b), 49 U.S.C. §1378(b), which directs that the Board "shall not approve any consolidation, merger, purchase [etc.] . . . which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not party to the consolidation, merger, purchase [etc.] . . .", with Section 412(b), 49 U.S.C. §1382(b), relating to "pooling and other agreements" which provides that "the Board shall by order disapprove any such contract or agreement . . . that it finds to be adverse to the public interest, or in violation of this chapter, ..."

able problems facing related industries. In this context it is appropriate to consider subsequent legislation in interpreting related prior enactments. *Great Northern R. Co. v. United States*, 315 U.S. 262, 277 (1942). Congress used Section 15's language in the Civil Aeronautics Act in a manner directly inconsistent with the Commission's reading of that same language. At the very least, this makes dubious the "plain meaning" of Section 15 which the Commission here urges on the Court.

B. The Commission's discovery of the "plain meaning" of Section 15 of the Shipping Act, 1916, is very recent and merits no judicial deference.

Nor is this a case where deference should be accorded an agency's reading of its own enabling legislation because its administrators participated in the drafting and directly made their views known to Congress in the committee hearings. On the contrary, as the Court observed in *Zuber v. Allen*, 396 U.S. 168, 193 (1969), "[t]hese props that serve to support a disputable administrative construction are absent here."

Far from being a "contemporaneous construction," the Commission's perception of the "plain meaning" of Section 15 is of recent origin. Sales of ships are common in the maritime industry. Yet, until this case, to the best of our knowledge of Commission practice extending back more than 40 years, the Commission did not require approval of such agreements where they did not limit competition between the parties.[18] The absence of a

[18] Until the recent cases, all the reported Commission decisions involved some restrictive arrangement in addition to the ship sales. See *New York and Porto Rico SS Co.–Waterman SS Corp. Agreement*, 2 USMC 453 (1940) (sale of good will and agreement

jurisdictional claim over agreements of this type is especially significant. If they are within Section 15, they must immediately be filed with the Commission for a failure to file would itself violate Section 15, *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968), a violation the Commission could proceed against on its own motion. *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 484, 486 (1932).[19] The Commission's half century of silence in the face of innumerable unfiled asset acquisition agreements confirms that its jurisdiction over ship sales contracts like the one at bar is far from "plain" under Section 15.[19a]

not to compete for ten years); Agreements 8745 and 8745-1, *Purchase of Vessels "Alicia" and "Dorothy"*, 7 FMC 199 (1962) (sale of two vessels and agreement not to compete for one year); *Agreement No. 8555 between Isbrandtsen Steamship, Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc.*, 7 FMC 125 (1962) (sale of entire business including 14 vessels and agreement not to compete); *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 FMC 53 (1967) (merger agreement among competing carriers), rev'd on other grounds, *Matson Navigation Co. v. FMC*, 405 F.2d 796 (9th Cir. 1968); *Agreement No. 9905*, 11 Pike & Fischer Ship. Reg. Rep. 1090 (1970) (sale of four vessels to competing carrier); *Agreement No. 9827 Between United States Lines, Inc. and Sea-Land Service, Inc.* (and Walter Kidde & Co., Inc., and R. J. Reynolds Tobacco Co., Guarantors), 11 Pike & Fischer Ship. Reg. Rep. 759 (1970) (20 year charter of 16 vessels between competing carriers); *cf.*, Agreement No. 9810–*Prudential Lines and Grace Line*, 11 Pike & Fischer, Ship. Reg. Rep. 284 (1969) (merger agreement between non-competing carriers).

[19]See also, *Unapproved Section 15 Agreements–South African Trade*, 7 F.M.C. 159, 190-92 (1962); *Unapproved Section 15 Agreement–Coal to Japan/Korea*, 7 F.M.C. 295, 302 (1962).

[19a]Moreover, Section 15 applies with equal force to transactions between foreign-flag carriers which serve the United States. *Alleged Rebate of Mitsui S.S. Co.*, 7 F.M.C. 248, 253 (1962); *Armament Deppe, S.A. v. United States*, 399 F.2d 794 (5th Cir. 1968),

C. Acceptance of the Commission's construction of Section 15 would repeal the antitrust laws by implication.

Another sound reason why the Commission's "plain meaning" approach to Section 15 was properly rejected by the court below is the substantive result its acceptance would engender. To hold that the Commission has jurisdiction over asset acquisitions or mergers is to decide that Congress intended to grant antitrust immunity to transactions not otherwise exempt. *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 242-243 (1968). The Court's decisions have long taught, however, that a congressional purpose to grant such immunity must be explicit. *E.g., United States v. Borden Co.*, 308 U.S. 188, 201 (1939). This is judicial recognition of the "fundamental" role which the antitrust laws play in our economy, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 219 (1966), and it requires that exemptions from the antitrust laws be strictly construed. *United States v. McKesson & Robbins*, 351 U.S. 305, 316 (1956).

This Court has explored the limits of Section 15 before. In so doing it has taken note of the fact that "[t]he Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress

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certiorari denied, 393 U.S. 1094. Ship sales and mergers are at least as common among foreign carriers as domestic. The Commission however, expressly disclaims Section 15 jurisdiction over mergers between foreign-flag carriers but relies on the identical provision to assert authority over foreign-flag agreements and sailing arrangements. Compare *Merger,–American Mail Line and Pacific Far East Line*, 11 F.M.C. 53, 57 (1967) with *City of Portland, Oregon v. F.M.C.*, 433 F.2d 502 (D.C. Cir. 1970).

which enacted the Clayton Act." *Carnation Co. v. Pacific Westbound Conference, supra,* 383 U.S. at 218 (1966). And with respect to the extent to which industry transactions were to be excepted from the Sherman and Clayton Acts, the Court concluded that (*Id.* at 218-220):

> . . . the §15 exemption clearly demonstrates that those who drafted the Shipping Act during the next Congress decided not to give the industry complete antitrust immunity. Since the problem of the application of the antitrust laws to the shipping industry was one of the focal points of the entire inquiry, the exemption provision could not have been a casual afterthought. The language of that provision must have been selected as a matter of deliberate choice . . . .

With all deference to the Commission, we submit that the "Congress which enacted the Clayton Act" and selected "the language of [Section 15] as a matter of deliberate choice," was unlikely to endow a new administrative agency with unprecedented authority to exempt acquisition agreements and mergers from the antitrust laws as "a casual afterthought", *i.e.*, by implication without express mention in the statute. In the circumstances, the court of appeals drew the correct conclusion: "on the face of the statute, the language of Section 15 does not vest the Commission with jurisdiction over the type of agreement here at issue—the acquisition of all the assets of one common carrier by water by another common carrier." 460 F.2d at 938.[20]

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[20] We fail to follow the Commission's reasoning in attempting to distinguish the positions of the Interstate Commerce Commission and the Civil Aeronautics Board, which have jurisdiction over asset acquisitions and mergers. (Brief, pp. 16-17). As this Court's decisions have repeatedly noted, each of those agencies derives that authority from express statutory grants. See, *e.g.*, *Hughes Tool Co.*

D. *Volkswagenwerk v. F.M.C.* does not compel acceptance of the Commission's understanding of the reach of Section 15.

The Commission's conception of Section 15 apparently stems from a belief that it is compelled by the Court's decision in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968).[21] We respectfully suggest that this is not the case. To begin with, whether asset acquisitions and mergers were within the Commission's jurisdiction under Section 15 was neither an issue in nor decided by *Volkswagenwerk*. That case held an agreement among parties subject to the Shipping Act assessing contributions for a Fund to mitigate the effects of automation on employees was subject to the Commission's approval under Section 15. The Commission itself had conceded in its own decision, however, that the procedure decided upon by the affected parties for raising the Fund was "a cooperative working arrangement" within the express language of Section 15 (390 U.S. at 271), but had declined jurisdiction on the extra-statutory ground that the arrangement did not "affect competition" (*id.* at 273). It was this conclusion by the Commission that the Court held "does not square with the structure of the statute." (*id.* at 275).

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v. Trans World Air Lines, Inc., ____ U.S. ____, 34 L. Ed. 2d 577, 582 (1972), and *Pan American World Airways v. United States, supra*, (C.A.B.); *Denver & R.G.W. R.R. Co. v. United States*, 387 U.S. 485, 913 (1967) (I.C.C.).

[21] A similar conclusion was reached by the majority in *Matson Navigation Company v. F.M.C.*, 405 F.2d 796 (9th Cir. 1968), but rejected by the dissenting judge (*id.* at 802), by the district court in *United States v. R. J. Reynolds Tobacco Company*, 325 F. Supp. 656, 661 (D.N.J. 1971), and by the court below, 460 F. Supp. at 957.

To be sure, this Court did say in *Volkswagenwerk* that the Commission had taken "an extremely narrow view of a statute that uses expansive language." (390 U.S. at 273). But that statement is to be understood in relationship to the argument advanced by the Commission in that case that it could limit its jurisdiction over subject matter Congress explicitly made subject to its authority in the Act. It does not follow, however, that because the Commission was off course in *Volkswagenwerk* a 180 degree turn was required. The Court itself recognized in that case that not all agreements which conceivably could be read as within Section 15 are in fact embraced by the provision. Thus the Court took pains in the *Volkswagenwerk* decision to disassociate itself from any suggestion that collective bargaining agreements in the maritime industry might be subject to the Commission's jurisdiction under Section 15, stating (390 U.S. at 278):

> Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity.[22]

An agreement subject to Section 15 and not filed for Commission approval would, of course, be invalid. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

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[22] The Commission, however, still insists it has Section 15 jurisdiction over collective bargaining agreements at least to some degree. See *Boston Shipping Assn. v. United States*, ____ F.2d ___, 8 Pike & Fischer Ship. Reg. Rep. 20,828 (1st Cir. 1972); on remand to the Commission *sub nom. United Stevedoring Corp. v. Boston Shipping Assn.*, 13 Pike & Fisher Ship. Reg. Rep. 257 (F.M.C. 1972).

Asset acquisitions and mergers are on a similar footing. Like the relations between management and labor, they involve basic national policies transcending the interests of any single industry. See, *Carnation Co. v. Pacific Westbound Conference, supra*; *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. McKesson & Robbins, supra*; *Schroegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951); *United States v. Borden Co., supra.* Particularly in light of the Court's observations in *Carnation Co.* that the Congressional draftsmen of Section 15 only "wanted to give the shipping industry a limited antitrust exemption" (383 U.S. at 219-20), the court below very properly declined to construe *Volkswagenwerk* as abandoning, *sub silentio*, the carefully considered position which this Court reiterated in the cases cited against implying exceptions to the antitrust laws. Whether asset acquisitions or mergers fall within Section 15 was simply not before this Court in *Volkswagenwerk*. Not unexpectedly, the Court made no attempt to discuss—much less distinguish—the relevant cases and the fundamental antitrust principles for which they stand.

In short, we submit that the language of Section 15 relied on by the Commission can not fairly be understood to cover asset acquisitions and mergers. Even assuming *arguendo* that the words can be stretched to cover the Commission's reading of them, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers'." *Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612, 619 (1967), quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). As we now show, the court below was equally correct in concluding that the legislative history of Section 15 does not support the Commission's position.

III.

THE LEGISLATIVE HISTORY OF SECTION 15 CONFIRMS THAT IT WAS DIRECTED AT REGULARIZING ONGOING ANTICOMPETITIVE AGREEMENTS IN THE SHIPPING INDUSTRY AND NOT IMMUNIZING ASSET ACQUISITIONS OR CONSOLIDATIONS.

The legislative history of Section 15 does not support the contention that the provision was intended to give the Commission jurisdiction over ship acquisitions or consolidations of lines. The Court has previously noted that "[t]he genesis of the Shipping Act was the 'Alexander Report'[23] in 1914," and that the Act was intended to carry out the recommendations of that Report.[24] Prepared under the supervision of Congressman J.W. Alexander, then chairman of the House Committee on Merchant Marine and Fisheries, it encompassed the results of an "exhaustive inquiry" into anticompetitive practices prevalent in the maritime industry at the time. The hearings were far-ranging, but the Committee's focus of interest is clearly illustrated by its "Recommendations Relating to Water Carriers Engaged in the Foreign Trade," (Alexander Report, p. 415 *et seq.*, and reproduced in its entirety as an appendix to this brief, *infra*, pp. 1a-10a):

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[23] House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. R. Doc. No. 605, 63rd Cong., 2nd Sess., Vol. 4 (1914) [hereinafter referred to as the Alexander Report].

[24] *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 488 (1958); *Carnation Co. v. Pacific Westbound Conference, supra*, 383 U.S. at 218-220; *Volkswagenwerk v. F.M.C., supra*, 390 U.S. at 276.

The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. (For a full classification of these agreements see pp. 281 to 295 of the report.) The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. (For a full classification of the advantages and disadvantages see pp. 295 to 307 of the foregoing report.)

It was against this background of largely secret anticompetitive conference arrangements among the lines which were "almost universal practice" that the Committee framed its proposals (Alexander Report 415-416):

In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be

prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing abuses.

After describing the claimed advantages of the system as it operated under those agreements—regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, rate parity and equal treatment of shippers—the Committee decided in favor of allowing them to continue under government supervision (Alexander Report at 416, emphasis added):

> These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing arrangements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.* Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.

The Alexander Committee was focusing on the problems inherent in ongoing arrangements among independent steamship companies. It recognized that circumstances did not justify a flat prohibition against such arrangements, for it appreciated that the result would be consolidation and merger of the existing lines. This, in the Committee's view, was an even more undesirable evil. One of the purposes of the Committee was to *discourage* the trend to such consolidations by authorizing and regularizing conference agreements which shielded the weaker lines. Alexander Report, p. 301. The Committee's solution, adopted by the Congress, was to make the conferences open and public and the restrictive agreements subject to government approval and supervision.[25] See *Carnation Co. v. Pacific Westbound Conference*, *supra*, 383 U.S. at 219.

The court below properly concluded that Congress' intent in enacting the Shipping Act, 1916, was "to tolerate only the minimum anti-competitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines by the method of government supervision of anticompetitive working arrangements". (460 F.2d at 940). In particular, the Court correctly noted that "the Committee had neither sought information nor had discussion on ship sale agreements." *Ibid*. Thus, there is

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[25] "The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as means of preserving to American exporters and importers of the advantages enumerated, and of preventing the abuses complained of." Alexander Report at 418.

no basis to read into Section 15 of the Act any implied intention on Congress' part to cover such agreements; they were not part of the problem. As for consolidations and mergers, as noted the Committee was attempting to discourage, not immunize, them. It had no reason to author a means by which they could be protected from the reach of the antitrust laws.

To be sure, the Committee did receive some data relating to consolidations among the lines. However, these were significant only in domestic commerce, not in the foreign trades. The Committee's own summaries of the anticompetitive practices it uncovered lists "control through acquisitions" only as a problem with respect to water carriers in the *domestic* trade (Alexander Report, p. 409), but makes no mention of any similar problem respecting the lines in American Foreign Trade (Alexander Report, pp. 281-314). Not unexpectedly, the Alexander Report made no recommendations regarding ship acquisitions or mergers in the foreign trades but did as to the domestic trades, limited, however, to proscribing railroad acquisitions of interstate barge lines. Alexander Report, p. 424.[26] Given the Committee's very limited recommendations respecting consolidations of domestic water carriers where such mergers were a problem, it simply does not follow that the Committee

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[26] "Recommendation Relating to Water Carriers Engaged in the Domestic Trade.... (12) That all interstate traffic on canals be placed under the supervision of the Interstate Commerce Commission; and that the railroads be prohibited in the future from acquiring, either directly or indirectly ownership and control of or interest in canals, or water lines, forwarding companies and other navigational facilities on such canals, when the same are used in interstate transportation."

wanted to vest blanket jurisdiction over these matters in the Commission respecting the foreign trades where they were not a problem and unmentioned in its "Recommendations." The excerpts from the Report cited by the Commission are not to the contrary.[27]

The conclusion that Congress did not intend to provide, *sub silentio*, for the antitrust immunization of acquisitions and mergers in enacting Section 15 is further supported by the terms used in the Alexander Report. For example, the Committee carefully distinguished among "(1) control through the acquisition of water lines or the ownership or accessories to the lines; (2) control through agreements or understandings; and (3) control through special practices." Alexander Report at 409. As the court of appeals noted (460 F.2d at 939), term "agreement" was not used in the Report to refer to asset acquisitions or consolidations.[28]

Moreover, it is to be recalled that the 62nd Congress, which authorized Chairman Alexander's investigation into the shipping industry in 1912, was the same one which enacted the Panama Canal Act later that year.

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[27] The material quoted by the Commission at the bottom of p. 29 of its brief is cited as a recommendation of the Committee. This is incorrect; it is from the "*Leading Recommendations of Witnesses for Proposed Legislation.*" Alexander Report, p. 307. Examination of the full quotation in context also makes clear that the witnesses were concerned with the "regulation of rates" and "conditions of water transportation," not ship acquisitions or mergers. *Id.* at 308.

[28] This is strikingly illustrated by completing the opening sentence of the paragraph from page 301 of the Alexander Report quoted by the Commission at pp. 28-29 of its brief (additional quotation italicized): "*In addition to combinations by agreement* there are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries."

Among other provisions, that Act amended the Interstate Commerce Act to make unlawful the control by railroads of common carriers by water using the Canal. 49 U.S.C. §5(14). And the Congress to which the Alexander Report was submitted in 1914 enacted the Clayton Act. Section 7 of that Act, as the court of appeals observed, "speaks in terms of the 'acquisition by one corporation of the [whole or any part of the] stock of another' and is directed at controlling corporate mergers." 460 F.2d at 937. The draftsmen of the Shipping Act were thus well aware of statutory language to preclude corporate consolidations. In the circumstances, the court below rightly concluded that (460 F.2d at 937, footnote omitted):

> It is highly unlikely, in view of this specific statutory treatment by Congress of the antitrust implications of acquisitions of corporate control, that Congress originally intended to exempt such acquisitions under Section 15 of the Shipping Act by making no specific reference to them but simply by including them under the rubric "agreement." On the contrary, the silence of Congress in Section 15 with respect to the subject of acquisition of control or ownership can only be taken to mean that Congress had no intention by the Shipping Act of 1916 to exempt such arrangements from the normal administration of the antitrust laws. The Federal Maritime Commission's attempt to derive a contrary affirmative intent on the part of Congress from its silence is not a favored method of statutory interpretation.

Because the court of appeals' opinion delves fully into the legislative history of Section 15, we have limited our own recapitulation to certain salient points. The establishment of negative proposition, however, *i.e.*, what Congress did not intend in enacting Section 15 over half a

century ago, is a difficult task. Congressional committee reports are normally drafted in terms of their positive goals and the Alexander Report is no exception. Reading excerpted passages does not always convey fully the direction of the authors' concerns. For this reason we have appended to this brief the entire section of the Report containing the "Recommendations of the Committee." (*Infra*, pp. 1a-10a). We respectfully submit that even a cursory review of that section will confirm that the Congressional authors of the Shipping Act did not intend to convey the jurisdiction over ship sales, asset acquisitions and mergers which the Commission here claims.

IV.

NEITHER POST ENACTMENT LEGISLATIVE ACTIONS NOR POLICY CONSIDERATIONS SUPPORT THE COMMISSION'S POSITION.

1. As it did in the court below, the Commission again asserts "post enactment consideration of Section 15 by Congress" supports its claimed authority over asset acquisitions and mergers in the shipping industry (Brief, p. 38). In particular, it relies on a 1950 amendment to Section 7 of the Clayton Act[29] expanding the scope of that Section to include asset acquisitions but exempting from its application transactions authorized by several agencies, including one of the Commission's predecessors. The Commission urges that this confirmed its merger jurisdiction under Section 15.

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[29] Act of December 29, 1950, c. 1184, 64 Stat. 1125-26, 15 U.S.C. §18.

The court below properly rejected the contention as no more than a "bootstrap attempt" to gain additional authority. As the court of appeals stated (460 F.2d at 941-942), the Commission was added to the list only as the result of its own request which acknowledged that the legislative proposal in question did not purport to affect any pre-existing authority. The correctness of that acknowledgement was promptly confirmed in the Senate report on the measure.[30] We note that a similar argument was rejected in *California v. Federal Power Commission*, 369 U.S. 482, 486 (1962):

> The words "transactions duly consummated pursuant to authority" given the Commission "under any statutory provision vesting such power" in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in §7 of the Clayton Act "... it is not intended that ... any ... agency" mentioned "shall be granted any authority or powers which it does not already possess." S.Rep.No. 1775, 81st Cong. 2d Sess., p. 7.

In short, here as in *Rainwater v. United States*, 356 U.S. 540, 543 (1958), "at most the ... amendment is merely an expression of how the ... Congress interpreted a statute passed by another Congress ... half a century

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[30] S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950), 2 U.S. Code Cong. Serv. 4300 (1950):

> ...(2) The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. *In making this addition, however, it is not intended that the Maritime Commission*, or, for that matter, any other agency included in this category, *shall be granted any authority or powers which it does not already possess.* [Emphasis added].

before. Under these circumstances such interpretation has very little, if any, significance."

2. Finally, the Commission's brief urges that antitrust and Shipping Act standards respecting asset acquisitions and mergers are not the same and therefore "Commission expertise must be called upon to reconcile the conflicting national policies." (Brief, p. 43). The extent of the Commission's "expertise" in this troublesome area is, to say the least, a matter of some debate even among the Commissioners.[31] Be that as it may, however, policy arguments of this sort are properly addressed to the Congress. Without immobilizing the industries concerned,

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[31] By a 3 to 2 vote on February 12, 1973 the Commission purported to approve the merger of the first and second largest containership operators in the world over the objections of the Department of Justice, competing United States-flag lines and others. *Agreement No. 9827 Between United States Lines, Inc., and Sea-Land Service, Inc., et al., FMC Docket Nos. 69-56 and 70-51.* Dissenting from that decision, F.M.C. Chairman Helen Bentley and Commissioner Ashton Barrett made the following comments (*inter alia*) pertinent to the Commission's "expertise" in this area:

> The majority would approve the "merger," but only upon the imposition of "conditions" which in their view are designed to "enable USL to remain a viable and independent company." In doing so, the majority ignores the lengthy record before it, misapplies the governing principles of the applicable law and ultimately proffers a "solution" that is at best exceedingly impractical and at worst totally unworkable.... To summarize our discussion, a close study of the record fails to lend any support to the action by the majority. The pronouncements contained in [*Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 (1968)] have been ignored by the majority who have fashioned an approval of the proposed merger agreement with "conditions" that are neither workable, justified by the record, or supported by realistic application [Slip Opinion at pp. 149-150, 156].

that body in its judgment has declined to grant other regulatory agencies authority to immunize transactions of this nature from the antitrust laws.[32] And even where it has granted this authority to agencies regulating other modes of transportation, it has insisted that asset acquisitions and mergers meet different standards for approval than ongoing cooperative working arrangements between competitors.[33] We respectfully suggest that the Commission's contentions regarding the appropriate manner for handling these problems are being presented before the wrong forum.[34]

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[32] See, *e.g.*, *California v. Federal Power Commission*, *supra*, 369 U.S. at 485-487.

[33] See, *e.g.*, the Federal Aviation Act of 1958, discussed *supra*, note 17 on page 15, *supra*.

[34] PFEL and Oceanic have not briefed the issue whether the Commission's approval of the contract of sale should be affirmed in the event the Court holds the Commission to have jurisdiction under Section 15, the issue not being presented here as no cross-petition raising it was filed. *Alaska Industrial Board v. Chugach Assn.*, 356 U.S. 320, 325 (1958). Should the Court reach the issue nonetheless, respondents believe the Commission's order should be affirmed and respectfully request opportunity to address the point.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ODELL KOMINERS
RICHARD S. SALZMAN
Attorneys for Respondents Pacific Far East Line, Inc., and The Oceanic Steamship Company.

KOMINERS, FORT, SCHLEFER & BOYER
Of Counsel.

February 26, 1973

APPENDIX

ALEXANDER REPORT, pp. 415-424
"Recommendations of the Committee"

The resolution (H. R. 587) under which the Committee has been investigating shipping combinations directs the Committee "to report to the House all facts disclosed by said investigation, and what legislation, if any, it deems advisable in relation thereto." In compliance with the directions of the resolution relating to legislation, the Committee submits the following recommendations:

RECOMMENDATIONS RELATING TO WATER CARRIERS ENGAGED IN THE FOREIGN TRADE.

The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report. (For a full classification of these agreements see pp. 281 to 295 of the report.) The report also presents the economic advantages and disadvantages of steamship agreements and conference arrangements as presented to the Committee by steamship line representatives and the exporting and importing interests of the United States. (For a full classification of the advantages and disadvantages see pp. 295 to 307 of the foregoing report.)

In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing

disadvantages and abuses. It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the advantages claimed as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)

These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place

American exporters at a disadvantage in many markets as compared with their foreign competitors.

Steamship line representatives, as well as the patrons of the lines, were almost a unit in emphasizing to the Committee the importance and necessity of the aforementioned advantages of agreements and conferences, and in asserting that these advantages can only be effected by permitting the several lines in a given trade to cooperate in the regulation of their rates and the expeditious handling of their business. Very few of the many exporters and importers, who communicated with the Committee, were opposed to agreements and conferences in themselves, provided they are fairly and honestly conducted. Many, however, objected to the secrecy with which agreements and conferences are now conducted; and stated that, while the advantages must be admitted, they have no assurance and no means of knowing whether the conditions claimed for agreements and conferences are always fulfilled. A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines. Unfortunately the truth of many of these complaints could not be ascertained because of the confidential nature of the information furnished. As pointed out in the report (p. 306), it seemed to be the general impression among shippers who filed complaints with the Committee that the conference lines—

> so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances.

While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action.

Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service.

All monopolies—

As pointed out in the foregoing report (p. 304)—

are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.

The consensus of opinion (see pp. 307 to 308 of the Report)—

As expressed in the testimony of witnesses and in the numerous communications received by the Committee from shippers—

is overwhelmingly in favor of some form of government regulation of steamship carriers engaged in this country's foreign trade. Nearly all the steamship line representatives, who appeared before the Committee, expressed themselves as not opposed to government supervision which is reasonable and which is limited to the requirements of full publicity and approval of all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies. On the other hand, the shippers who appeared as witnesses, or otherwise submitted recommendations for proposed legislation, were in the great majority of instances favorable to a comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers. While few of the shippers who communicated with the Committee by letter (and the same may be said of witnesses) attempted to specify

the details of their recommendations, they are almost a unit in stating that they are convinced of the desirability of having the Interstate Commerce Commission, or a similar commission, exercise a general supervisory power over foreign water carriers and enforce among the conference lines at all times the various contentions which they have claimed for themselves during the hearings before the Committee. It is noteworthy that only five of the many communications received by the Committee, which were unfavorable to steamship agreements and conferences as now conducted, display an attitude of hostility toward government regulation. In fact, many of the communications received from shippers make it clear that the writers regard the contentions of the conference line representatives as advantageous to shipper and shipowner if they are honestly and fairly carried out, but state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses.

Relative to such supervisory control by the government of steamship carriers in the foreign trade of the United States, the Committee offers the following recommendations:

(1) That navigation companies, firms or lines engaged in the foreign trade of the United States be brought under the supervision of the Interstate Commerce Commission as regards the regulation of rates, the approval of contracts entered into with other water carriers, with shippers, or with American railroads and other transportation agencies, and such other conditions of water transportation as affect the interests of shippers. The Committee has had under consideration the recommendation of a separate Commission for this purpose, but believes that, in view of the close relations existing between rail and water transportation, it would be best to entrust the supervisory control to the Interstate Commerce Commission. If found necessary, in view of the added duties involved in the extension of the Interstate Commerce Commission's jurisdiction to water transportation in accordance with the recommendations to follow, the Committee further recommends that the membership of the Commission be enlarged.

(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agree-

ments (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order canceled any such agreements, or any parts thereof, that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States.

(3) That the Interstate Commerce Commission be empowered to investigate fully complaints charging the unreasonableness or unfairness of rates, or to institute proceedings on its own initiative, and to order such rates changed if convinced that the rate under consideration is unreasonably high, or discriminating in character as between shippers, or ports, or between exporters of the United States and their foreign competitors; and to order restitution to shippers of all sums collected in excess of reasonable rates. This recommendation is also intended to extend to the supervision of freight classifications used by the lines, and the investigation of complaints charging refusal on the part of any carrier to properly adjust the rates between classes of commodities.

The committee realizes that the steamship business differs essentially from that of the railroads (for those differences see pp. 309 to 311 of the Report), and that it might prove injurious to both ship owners and American exporters to require the lines to file their rates and not be permitted to lower the same until after a stipulated period of notice to change rates had been given. On the other hand, the committee feels that in the absence of government control steamship combinations may in many instances have it within their power to arbitrarily raise rates to an unreasonable degree both as regards the general level and in the case of particular commodities; or, if they so desire, to fail in maintaining rates from the United States to foreign markets on a parity with those from other countries. It is not the purpose of this recommendation to prevent steamship lines from promptly lowering their rates to meet competitive conditions and thus to favor American exporters, who, in competing with foreign markets, often find it necessary in order to close their contracts to have quoted an immediate and favorable rate; but the purpose of the law

should be to protect the shipper against any unreasonably high rate which the combination lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of government supervision and control.

(4) That rebating of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers, irrespective of the volume of freight offered for shipment.

(5) That the Interstate Commerce Commission be empowered to investigate fully all complaints (or to undertake such investigation on its own initiative) charging (1) failure on the part of any carrier to give reasonable notice of increase in rates, (2) unfair treatment of shippers in the matter of cargo space and other facilities, (3) the existence of discriminating or unfair contracts with certain shippers, and (4) unfairness in the settlement of claims and indifference to the landing of freight in proper condition. In this connection the Commission should be empowered to order the discontinuance of all unfair or discriminating practices which it may find to exist, and to adopt whatever measures it may deem necessary to protect the complainant against retaliation.

(6) That the use of "fighting ships" and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.

(7) That adequate penalties be provided to correct and prevent the abuses hereinabove set forth.

RECOMMENDATIONS RELATING TO WATER CARRIERS ENGAGED IN THE DOMESTIC TRADE.

Unlike the practice of water carriers in the foreign trade of the United States, agreements to divide the territory or charge certain rates in the domestic trade are few. Competition in rates between domestic water lines, however, has been quite as effectively eliminated

as in the foreign trade and this has been accomplished by the several lines through one or more of the numerous methods discussed in Part II of the foregoing report and summarized on pp. 409 to 412. (Also see pp. 403 to 412 giving a "summary of the extent and methods of control of competition between water carriers in the domestic trade.")

The Act of August 24, 1912, providing for the opening, maintenance, protection and operation of the Panama Canal, contains provisions extending the jurisdiction of the Interstate Commerce Commission over interstate transportation which involves the carriage of property by rail and water, in the following particulars; viz, (1) to establish physical connection, where this is reasonably practicable and justifiable, between the rail carrier and the dock of the water carrier by directing either or both of the carriers to construct the connecting tracks; (2) "to establish through routes and maximum joint rates over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced"; and (3) "to establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates will apply." Section 11 of the Act also provides for the divorcing of common carriers by water from the railroads under certain conditions. These legislative requirements go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States. The Committee, however, believes, in view of the facts presented in Part II of the report, that additional legislation is required, and wishes to offer the following recommendations:

(1) That the jurisdiction of the Interstate Commerce Commission be extended to the interstate port-to-port traffic of domestic water carriers, with full power to require all such carriers to file their port-to-port rates and to submit reports of their financial and business operations. As regards interstate port-to-port traffic the Commission should be given full power to regulate rates and to determine maximum charges.

(2) That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements

affecting interstate transportation, whether written or oral, and all modifications or cancellations thereof, with other water carriers, with railroads or other transportation agencies, or with shippers.

(3) That the carriers be prohibited from granting rebates of any kind to shippers and from discriminating between shippers in rates, in the giving of space accommodations and other facilities, and in the making of unfair contracts based on the volume of freight offered. Water carriers should also be prohibited from using fighting ships, or deferred rebates, or from threatening or resorting to retaliatory or other unfair measures against shippers or competitors. The Interstate Commerce Commission should be empowered to adopt whatever measures it may consider necessary to protect shippers or competitors against such retaliatory methods. Water carriers, if cutting rates with a view to driving out a competitor, should be denied the privilege of restoring rates; and jurisdiction should be conferred on the Interstate Commerce Commission to determine whether rates were cut with the object of crushing such competitor.

(4) That the Interstate Commerce Commission be empowered to investigate fully all complaints charging unfairness in the settlement of claims, and indifference to the loading and landing of freight in proper condition; and to adopt all necessary rules and regulations for the adjustment and settlement of claims.

(5) That as regards all matters relating to Interstate transportation, all traffic associations or conferences, whether pertaining to through rail-and-water transportation or to port-to-port traffic only, be brought under the supervision of the Interstate Commerce Commission. The Committee recommends that the conditions under which an outside water carrier is admitted to such associations or conferences should be approved by the Commission, and that an outside line should not be denied membership for unfair reasons or simply because the unanimous consent of existing members of the association or conference to the admission of said line cannot be obtained.

(6) That the railroads be prohibited from making the through rail-and-water route unprofitable as compared with the all-rail route by charging more for the same service on water-borne commodities than they charge for the proportionate share of the all-rail haul.

(7) That the Interstate Commerce Commission be empowered to compel railroads to allow competitive water carriers to apply effective

differentials. The Commission should also have full supervisory power over divisions between railroads and water carriers as regards through rail-and-water rates. The Committee recommends that rate divisions on any trade route should be opened equally to all water carriers that comply with such conditions of quality and regularity of service as the Commission may determine to be reasonable.

(8) That the railroads and water carriers be required to issue through bills of lading to all interstate water carriers that meet such conditions of quality and regularity of service as the Interstate Commerce Commission may consider reasonable.

(9) That railroads be required to account separately to the Interstate Commerce Commission for the income and expenditures of interstate water lines owned or controlled by them.

(10) That railroads be required to make their terminal facilities available to water carriers on equal terms and under such reasonable conditions as the Interstate Commerce Commission may prescribe. The Committee also believes that the Federal Government should pursue a policy of not expending money in the interests of any port for harbor or channel improvements, unless that port has efficient dock facilities available to all water carriers.

(11) That there should be legislation providing for equal treatment to all shippers and water carriers by transfer and lighterage concerns when forming a link in interstate or foreign commerce.

(12) That all interstate traffic on canals be placed under the supervision of the Interstate Commerce Commission; and that the railroads be prohibited in the future from acquiring, either directly or indirectly, ownership and control of or interest in canals, or water lines, forwarding companies and other navigation facilities on such canals, when the same are used in interstate transportation.

Respectfully submitted.

J. W. ALEXANDER,
Chairman.